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No. 417

In the Supreme Court of the United States

October Term, 1961

[redacted] Labor Relations Board, petitioner

[redacted] Products, Inc.

[redacted] TO THE UNITED STATES
[redacted] FOR THE NINTH CIRCUIT

[redacted]
Solicitor General,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SYLVANIA ELECTRIC PRODUCTS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit entered in this case on June 6, 1961.

OPINIONS BELOW

The decision of the court of appeals (App. B, *infra*, pp. 17–25) is not yet reported. The findings of fact, conclusions of law, and order of the Board (J.A. 32–39)[1] are reported at 127 NLRB 924.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1961 (App. C, *infra*, p. 26). On August

[1] "J.A." refers to the portions of the record printed as a Joint Appendix to the briefs filed in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

31, 1961, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Frankfurter to and including September 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an employer violates the bargaining requirements of the National Labor Relations Act by declining to furnish the union representing its employees with information pertaining to the premium costs of an employee group insurance plan paid for exclusively by the employer.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix A, *infra*, pp. 15–16.

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

For a number of years the production and maintenance employees at Sylvania's plant at Seneca Falls, New York, have been represented by the United Steelworkers of America, hereafter called the Union (J.A. 33). Prior to 1958 the Company and Union had agreed upon a group insurance program which provided employees in the bargaining unit with specified amounts of life insurance and sundry disability and hospital-surgical benefits. The Company paid the premiums, the amount of which was not revealed to the employees, and received any refunds justified by

experience. Although the collective bargaining agreement was negotiated in terms of specified benefits, the Company has always taken into account the cost of this program in formulating its position as to the amount of insurance benefits which it is willing to provide (J.A. 14; 44).

On August 21, 1958, about a week before negotiations for a new contract were scheduled to begin, the Union wrote to the Company repeating its earlier requests for information "regarding the Insurance Program that covers our bargaining unit" (J.A. 9; 57) and specifying the following items as "the necessary information to make the proper re-evaluation" of that program (J.A. 9–10; 57–58):

(1) List of birth dates
(2) Percent of female employees
(3) Number of dependents
(4) Present premium rates by:
    (a) Life per $1,000
    (b) Weekly D.B.L.[2]
    (c) Hospital-Surgical-Medical
(5) Premiums paid and claims incurred for last two years by:
    (a) Life
    (b) Weekly D.B.L.
    (c) Hospital-Surgical-Medical
(6) Up-to-date booklet describing benefit schedule
(7) Average weekly wage

On September 2, 1958, the Company refused to supply the requested information (J.A. 10; 58). Its letter stated that the insurance program was based

[2] "D.B.L." denotes Non-occupational Disability Insurance.

"not so much on cost as on benefits provided," and that "the task of digging up the information would place a severe burden on the Personnel Department." Respondent suggested that the Union might be able to "obtain the same information from the Chairman of your Sick Committee" (J.A. 11; 59). Thereafter, when the Union notified the Company that it had been unable to secure the requested data on its own, the Company furnished the Union with items 1, 2, 3, 6 and 7, but declined to comply with the Union's request for the information about premiums specified in items 4 and 5 (J.A. 11; 42).

During the contract negotiations which began on August 26 and lasted until November 2, the Union frequently repeated its request for the premium costs which the Company had refused to make available (J.A. 12–13; 43). The Union protested that it "could not intelligently frame the economic demands unless [it] knew the cost of the group insurance benefits in that the group insurance benefits were part of the overall economic benefits negotiated" (J.A. 13; 43), and added that it also needed the information "to determine whether it was possible to get better coverage from another carrier" (J.A. 13; 43). The Company conceded during the negotiations that the cost of the insurance program was material in the determination of its bargaining position, and its manager of industrial relations testified that much of the cost information sought by the Union could have been made available, but the Company nonetheless refused at all times to supply such information (J.A. 12, 14; 44, 49–50). The only new reason given was "that

the Union was not legally entitled to this information" (J.A. 12; 43).

The Union filed an unfair labor practice charge in this case during the course of negotiations, based on the Company's refusal to furnish the insurance information (J.A. 2, 12). When agreement was finally reached on November 2, 1958, the Union told the Company that it accepted the insurance provisions of the contract without waiving the charge (J.A. 12, 14; 43, 44).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the Company's refusal to inform the Union of its premium costs for the non-contributory insurance program constituted a violation of Section 8(a)(5) and (1) of the Act. The Board found that the cost to the employer of employee benefits is an inseparable aspect of "wages" which must be available to both parties if there is to be meaningful collective bargaining.

The Board ordered the Company to cease and desist from refusing to bargain with the Union by refusing to furnish it with information and data concerning the premium costs of the group insurance program covering the employees in the bargaining unit. Affirmatively, the Board ordered the Company to furnish the desired information to the Union upon request, and to post appropriate notices (J.A. 37).

III. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board order on the ground that the Board's "inarticulate premise" must have been "that any cost saving to an employer is presumptively an increase in the employee's wages" and that this premise is "not in accord with current business economy or business thinking" (App. B., *infra*, p. 23). Noting that the Company had furnished information as to the "benefits" (*i.e.*, the scope and amount of coverage) of the plan, and that it had not refused the Union's demand for increased insurance coverage for the employees on the ground of cost,[3] the court concluded that the Company was privileged to withhold the information on premium rates (App. B., *infra*, pp. 23–25).

REASONS FOR GRANTING THE WRIT

Clarification of the extent of the employer's statutory duty to furnish material information while bargaining about a group insurance program is important, as a legal question, in the administration of Section 8(a)(5) of the National Labor Relations Act and, as a practical matter, in thousands of contract negotiations between employers and employees throughout the country. The decision below conflicts with the decision of the Seventh Circuit in *National Labor Relations Board* v. *John S. Swift*

[3] The Court acknowledged that should the employer, even in the case of a non-contributory plan, refuse "to accede to the Union's demand for increased or broader insurance coverage * * * on the ground of cost, the Union might be entitled to cost information" on the basis of *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149 (App. B., *infra*, p. 24).

Company, 277 F. 2d 641. It is also inconsistent with the governing principles concerning the nature of the duty to bargain collectively established by this Court and the courts of appeals.

1. It is settled law that an employer has a duty, upon request, to bargain collectively with the representative of its employees about such benefits as pensions upon retirement, group life insurance, hospital and medical insurance, and like "health and welfare" benefits. *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247 (C.A. 7) certiorari denied on this point, 336 U.S. 960; *W. W. Cross & Co.* v. *National Labor Relations Board,* 174 F. 2d 875 (C.A. 1); *National Labor Relations Board* v. *General Motors Corp.,* 179 F. 2d 221 (C.A. 2). In *National Labor Relations Board* v. *John S. Swift Co.,* 277 F. 2d 641, the Court of Appeals for the Seventh Circuit approved a logical corollary of this principle when it upheld an NLRB ruling that an employer violated Section 8(a)(5) by refusing to furnish a "breakdown as to the cost of its existing health and welfare plan" (p. 645).[4]

Information concerning premium costs is indispensable to collective bargaining about a health and welfare program for two reasons: it is essential to the union's decision as to what bargaining demands best serve the employees' end; and it is necessary if the

[4] The record in *Swift* differs from that in the present case only in that a plan requiring some employee contributions was involved. That this point of difference was considered completely irrelevant by the court of appeals is apparent from the fact that the Seventh Circuit did not even make mention of the contributory nature of the plan.

union is truly to share in a joint determination upon these conditions of employment.

First, the employees and their union representative cannot intelligently formulate proposals for negotiation unless they know the premium cost of the several items of which a health and welfare package is invariably composed. Although today the total premium will in some cases be of public record and thus available to the union, this information, by itself, is of limited value; for the total premium is made up of separate premiums for many small components such as group life, hospital board and room, various surgical benefits, maternity benefits, prolonged illness coverage, coverage of retired employees, etc.[5] In particular, in the present case, Sylvania was charged separate premiums for its medical benefit insurance, its disability insurance, and its life insurance (J.A. 12).

[5] The Welfare and Pension Plans Disclosure Act (Public Law 85-836, 72 Stat. 997, effective January 1, 1959), requires that an employer file an annual report with the Secretary of Labor setting forth among other information "the premium rate or subscription charge and the total premium or subscription charges paid" to each insurance carrier (Section 7(d)(1)). In the normal case, as here, where the plan involved provides for various benefits but is underwritten by a single insurance carrier, the employer satisfies the premium reporting provision merely by disclosing the total premium paid without allocating the cost to the beneficial components of the plan. Although Sylvania has filed a more complete breakdown of premium costs than is required under the Disclosure Act, even this information, which was not available at the time of the negotiations in this case, is not adequate for collective bargaining. Moreover, the continuing importance of the issue depends not upon what Sylvania or any other employer has chosen to furnish, but upon what is required by the Disclosure Act.

Such general information as an informed person might have about insurance costs is inadequate because the premiums for, and benefits to the employees of, different kinds of coverage depend upon such factors as the age, sex, and family status of the average employees in the particular bargaining unit. As the Union pointed out during the negotiations, the employees in this unit might wish to change some of the types and levels of benefits, perhaps even without increasing the cost to the Company. The provisions for continuing to insure employees after retirement, for example, was of little interest to this relatively youthful group and "if [the Union] knew the cost of the new insurance benefits for retired employees, it might wish to get increases in other benefits or wages which would better suit the employees in the unit it represented" (J.A. 13, 43–44). But the Union could not intelligently formulate such proposals without information about premium costs because it would have no way of comparing items in terms of cost.

Second, the information requested by the Union was essential to any bargaining about the health and welfare plan because the cost of present benefits is inescapably a factor highly material in the union's decision as to what benefits it may reasonably insist that the employer provide. Even if the court below is correct in its view that it is the benefits and not their cost which are "wages" to the employees, the essential point remains that intelligent discussion of alternative benefit proposals is frustrated by shutting off mutual consideration of their relative costs. Ob-

viously, any change in cost caused by an alternative benefit scheme is the focus of the employer's attention, even though he may also be interested in the extent of the benefits provided for his employees. Indeed the Company acknowledged that although it would not tell the Union what the costs were, it took those costs into account in arriving at the level of benefits to be offered to the employees. Even without this explicit admission, an experienced union negotiator would realize that the kinds and level of alternative benefits he could obtain through bargaining would depend upon whether and how much they increased the employer's cost. To require him to negotiate without this material information is to deny him the opportunity to address himself to what is in the minds of the company's negotiators and thereby to reduce greatly the likelihood of obtaining agreement on wages by collective bargaining.[6]

For this reason, the instant case is indistinguishable in principle, we submit, from the long line of decisions holding that an employer must furnish the union, upon request, with information showing the

[6] The court below was therefore in error in regarding the cost of benefits as no more relevant to the Union's bargaining demands than any other cost of production. A change in cost of raw materials or of legal advice may increase or decrease the company's net earnings and its net earnings may or may not be thought relevant to wages. The court below was right in pointing out that there is not, in every case, a direct relationship between such costs and wages. But clearly the cost of the components of a group insurance program is directly and inescapably related to the benefits provided. Knowing what the company has spent and is willing to spend for insurance benefits is essential to the Union's formulation and discussion of alternative plans which might be acceptable to the employer.

individual wage rates and wage histories of employees in the bargaining unit. See, *e.g.*, *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938; *Taylor Forge & Pipe Works* v. *National Labor Relations Board*, 234 F. 2d 227 (C.A. 7), certiorari denied 352 U.S. 942; *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58 (C.A. 1); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4). In neither the case of wage data nor of cost data is the requirement of furnishing relevant information an absolute prerequisite to any possible discussion of wages. It is conceptually possible for a union to propose new individual rates and merit increases without even knowing present wages, but, speaking practically, there can be no effective bargaining upon these subjects without data on present and past wages because the present rate of the particular employee, the rates of other employees, and the wage histories are uniformly recognized as significant factors in fixing individual rates and granting merit increases. Similarly, in the present case the requested cost information was not merely necessary to "mature" collective bargaining; it was necessary to any real bargaining about the health and welfare plan. Cf. Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1426–28, 1434, *et seq.*

The court below acknowledged that the employer, Sylvania, might have had a duty to furnish information concerning premium costs "if Sylvania had refused to accede to the Union's demand for increased or broader insurance coverage for the em-

ployees in the unit it represented on the ground of cost". The Company had conceded that premium costs were a factor bearing upon its willingness to make changes in benefits, but the court brushed this aside upon the ground that (App. B, *infra*, p. 24):

> Saying that it took the cost of its insurance into account in arriving at the "level of benefits to be offered to the employees" is not the equivalent of saying that it would not consider changes in its insurance program on account of cost. * * *

However, as the cases involving wage data show, once the practical necessity of the requested information to the bargaining is established, the employer's duty to furnish the information becomes plain. His refusal to disclose the cost of past benefits shuts off discussion of alternative proposals just as if he refused to discuss the point at all. It introduces a formalism which is not only empty but harmful to make the duty depend upon the exact form of words which the employer uses to acknowledge the self-evident fact that consideration of the cost of benefits enters into any judgment concerning the types and level of benefits to be paid—empty, because it reflects no real difference in substance; harmful, because employers and unions engaged in bargaining should be free to address themselves to the subject matter of their negotiations without worrying about escaping or being charged with an unfair labor practice because of the precise words used in the discussions.

2. The question presented has practical significance in many contract negotiations between employers and the representatives of their employees. Today the nature and amount of health and welfare benefits are major issues in collective bargaining. Department of Labor statistics show that in 1954 about eleven million workers were covered by some type of health and insurance plan under collective bargaining agreements. Almost seven million of these were under employer-financed plans.[7] By 1959 the number of employees who were beneficiaries of health and insurance plans under collective bargaining contracts had increased to over twelve million.[8] Of course, many of these programs fix the size of the employer contribution rather than the level of benefits, but it is plain that a large proportion fall in the latter category. Moreover, the significance of the issue is not limited to group insurance plans. It also extends to any employer-financed fringe benefit program, the cost of which is not available to the employees' bargaining representative.

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[7] *Health, Insurance, and Pension Plans in Union Contracts*, U.S. Dept. of Labor Bulletin No. 1187, p. 7 (Oct., 1955).

[8] *Health and Insurance Plans Under Collective Bargaining*, U.S. Dept. of Labor Bulletin No. 1280, p. 2 (late summer, 1959).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-barganing contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5704

SYLVANIA ELECTRIC PRODUCTS INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION TO REVIEW AND SET ASIDE AND CROSS PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges*

Gerard D. Reilly, with whom *Lawrence T. Zimmerman, Charles Hansen, Bruce Carswell* and *Reilly and Wells* were on brief, for petitioner.

Marcel Mallet-Prevost, Assistant General Counsel, with whom *Stuart Rothman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, and *Duane B. Beeson* and *Vincent W. Bradley,* Attorneys, were on brief, for respondent.

OPINION OF THE COURT

June 6, 1961

WOODBURY, *Chief Judge.* This petition to review and set aside and cross petition to enforce an order of the National Labor Relations Board pose a question with respect to the duty of an employer to divulge the cost of a noncontributory group insur-

ance program which it provides for its employees to the union representing an appropriate employee unit in one of its plants. The basic facts are not in dispute and can be briefly summarized.

The petitioner-employer, Sylvania Electric Products, Inc., is a multiplant Delaware corporation engaged in several states of the United States in the business of manufacturing electrical and electronic equipment of one sort or another.[1] For many years the production and maintenance employees at its plants in Seneca Falls, New York,[2] have been represented by United Steelworkers of America, AFL–CIO, and over that period it has negotiated collective bargaining agreements with that Union.

In the summer of 1958 as a prelude to, and later in the fall of that year in the course of negotiations for, a new collective bargaining agreement, the Union asked Sylvania for information with respect to its group insurance program, Stated generally the Union asked for information as to the level of benefits of the program, the scope of its coverage, the amount of claims paid under its various provisions and its cost. Sylvania eventually acceded to the Union's request for information except for its request for current premium rates and the amount of the premiums paid during the two preceding years.

The Union claimed that it could not intelligently frame its economic demands without knowing the present and past cost of Sylvania's group insurance program, and also that this information would help it to determine whether the best coverage for the money was being received and whether it was pos-

[1] There can be no doubt whatever that it is engaged in interstate commerce within the meaning of the Act.

[2] This court's jurisdiction rests upon the fact that the employer has plants in Massachusetts, New Hampshire and Maine and therefore transacts business in this circuit.

sible to get the same or better coverage from another carrier with a possible reduction in cost and commensurate increase in actual wages. Sylvania, although it told the Union that it had always taken the cost of its insurance program into account in arriving at the "level of benefits to be offered to the employees," persisted in its refusal to give the cost information requested. At one time or another during the collective bargaining negotiations it gave three reasons for its position. It first asserted that it based its program not so much on cost as on benefits provided and that "the task of digging up the information" would severely burden its personnel department.[3] Later it asserted that the Union had no legal right to the information. Both sides maintained their respective positions throughout the negotiations but nevertheless without a strike a collective bargaining agreement was reached soon after the previous one expired.

In the meantime the Union filed a charge on which in due course a complaint issued charging Sylvania with failing and refusing to bargain collectively with the Union in violation of § 8(a) (5) and (1) of the Labor Management Relations Act, 1947, by refusing to accede to the Union's request for the premium rates and the premiums paid for the past two years by Sylvania for its wholly non-contributory group insurance program.

[3] There is basis for this assertion, for Sylvania paid its insurance carrier an advance annual premium on its overall policy covering not only the employees at its Seneca Falls plant but also employees at other plants, and thereafter, at the close of the policy year, computations were made to adjust the amount of that premium to reflect the claims and other cost items that arose during the preceding year. This usually took several months.

The trial examiner, after proceedings under 10(c) of the Act, filed a carefully prepared intermediate report in which he concluded that Sylvania was under no duty to disclose the cost of its insurance program to the Union so that no unfair labor practice had been committed. He therefore recommended that the complaint be dismissed.

In his intermediate report the trial examiner was careful to draw two distinctions. He distinguished between the *benefits* of group employee insurance plans which, in major reliance upon this court's decision in *W. W. Cross & Co.* v. *NLRB,* 174 F. 2d 875, 878 (C.A. 1, 1949), he ruled were emoluments flowing from the employment relationship and hence were "wages" within the meaning of the Act, and the cost of obtaining those benefits. And he distinguished between the cost of group employee insurance plans defrayed in part by contributions from employees and the cost of non-contributory plans like the present, observing that the cost of plans of the former sort were vitally related to wages since they were borne in part by deductions from the employees' pay checks, whereas the cost of non-contributory plans were comparable to an employer's ordinary costs of operation such as the cost of raw materials or the interest paid on indebtedness.

The Board on General Counsel's objections to the intermediate report rejected the distinctions drawn by the trial examiner. It expressed the view that "no valid legal basis exists" for drawing a distinction between the cost of contributory and non-contributory employee group insurance plans. And it grouped both the costs and the benefits of such plans into the single category of "emoluments of value" which it said constituted "wages." It said

> "* * * The term 'wages,' concerning which bargaining is required by the Act, has been held to comprehend the emoluments of value which may accrue to employees out of the employment relationship. It seems indisputable to us that, where the employer shoulders the entire cost of a group insurance program, so that the employees themselves are not required to allocate any part of their weekly wages for the purposes, there inures to the employees a benefit which constitutes an emolument of value, and that this benefit flows from the employment relationship. This benefit to the employees which represents part of the remuneration received by them for their labor therefore constitutes 'wages' and, as such, the cost thereof to the Respondent stands on a different footing for purposes of the Act from the operating costs with which it is equated by the Trial Examiner."

On the basis that the premiums paid by Sylvania for its group insurance program constituted "wages" paid to its employees and that therefore the premium cost data requested by the Union related directly to a matter of wages, the Board concluded that Sylvania had violated § 8(a) (5) and (1) of the Act by refusing to furnish the Union with the data it requested as to the cost of that program. Wherefore it entered the order before us directing Sylvania to cease and desist from refusing to bargain collectively with the Union by refusing to furnish it with the cost data it requested.

This court held in *W. W. Cross & Co.* v. *NLRB*, supra, that the *benefits* of an employee group insurance plan were "wages" within the meaning of that word as used in the pertinent sections of the Act since they constituted emoluments resulting from employment or direct and immediate economic benefits flowing from the employment relationship, and hence were

matters as to which the Act required employers to bargain collectively in good faith with the union representing an appropriate group of employees. We adhere to that decision. Moreover, we might take another step and agree with the trial examiner that the cost of plans to which employees contribute constitutes "wages" by reason of the direct effect of each employee's contribution upon his pay check. It is quite another matter, however, to go further and endorse the Board's broad conclusion that the cost of a group employee insurance program defrayed entirely by the employer also constitutes "wages" to employees. In the absence of any controlling authority, or indeed, of any judicial authority cited or discovered by our own efforts, we decline to take that step.

The premiums Sylvania paid for its non-contributory group insurance program were neither wages nor conditions of employment within any ordinarily accepted meaning of the words used. The Board rested its conclusion that they were emoluments of value to the employees, and hence "wages," on the proposition that had Sylvania not undertaken to provide its employees with insurance coverage they would, if they wanted such coverage, have had to provide it out of their own pockets. But to define an employer's contribution to a non-contributory welfare program as "wages" to the employees for that reason stretches our language in the *Cross* case about "direct and immediate economic benefits flowing from the employment relationship" too far, for it would expand the concept of wages so far as to break down if not destroy, the distinction drawn in the Act between "wages, hours, and other terms and conditions of employment," as to which there is the mutual mandatory duty to bargain collectively, and those other matters as to "which each party is free to bargain

or not to bargain and to agree or not to agree." *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Furthermore, inherent in the conclusion reached by the Board, as the trial examiner pointed out, is the inarticulate premise that any cost saving to an employer is presumptively an increase in the employees' wages. While no doubt employer costs affect wages, a direct relationship between them is at the best speculative, and not in accord with current business economy or business thinking. The long and short of the matter is that what Sylvania paid for its non-contributory group insurance program, in our opinion, was neither a wage "nor a term or condition of employment," within any generally accepted meaning of the terms.

That is not to say, however, that under no circumstances is a union entitled to information as to the cost of non-contributory programs like the present. The benefits of plans like Sylvania's constitute "wages" to its employees. *W. W. Cross & Co.* v. *NLRB*, supra. Thus to meet the requirement of good faith in bargaining with respect to benefits as wages, an employer must make available to the employees' representative whatever facts and data may be relevant and necessary to informed and realistic bargaining as to benefits. *Yawman and Erbe*, 89 NLRB 881, enforced, 187 F.2d 947 (C.A. 2, 1951). See *International Woodworkers of America* v. *NLRB*, 263 F.2d 483 (C.A.D.C., 1959); *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58 (C.A. 1, 1955), and cases cited therein. It was therefore incumbent upon Sylvania to disclose the scope and amount of the coverage afforded by its plan as it did. Its duty of disclosure does not, however, necessarily stop there for the Court in *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), although stating that each case must be de-

cided on its own particular facts and that "The inquiry must always be whether or not under the circumstances of the particular case the statutory duty to bargain in good faith has been met," nevertheless held that the Board was warranted in concluding that an employer had failed to bargain in good faith by refusing a union's request for specific data in support of an assertion of financial inability to meet the union's demand for an increase in wages. Thus if Sylvania had refused to accede to the Union's demand for increased or broader insurance coverage for the employees in the unit it represented on the ground of cost, the Union might be entitled to cost information provided, we glean from the opinion in *Truitt* at page 151, its demand for information was not made to impede the bargaining process or to injure or embarrass Sylvania in its business, and provided further, compliance with the Union's request would not be unduly burdensome or time consuming.

Here, however, no issue of cost arose, for Sylvania at no point in its negotiations with the Union interposed cost as a factor bearing on its willingness to consider any proposal the Union might make with respect to changes in its employee insurance program. Saying that it took the cost of its insurance into account in arriving at the "level of benefits to be offered to the employees" is not the equivalent of saying that it would not consider changes in its insurance program on account of cost. Sylvania provided the Union with all the information it required with respect to the scope and amount of the benefits of its insurance program and this is all the Union needed to formulate demands for changes in the program. Demands for other or more extensive coverage could be formulated without reference to cost and so could demands for an increase in cash wages. The cost of the insurance

program would become an issue should Sylvania interpose that element as a ground for resisting a request for change in insurance coverage. When that occurs the time will come to decide whether Sylvania should provide cost data to support its position.

A decree will be entered setting aside the order of the National Labor Relations Board.

APPENDIX C

DECREE

June 6, 1961

This cause came on to be heard upon a petition
review and set aside and cross petition for the e
forcement of an order of the National Labor Rel
tions Board and was argued by counsel.

Upon consideration whereof, It is now, to w
June 6, 1961, here ordered, adjudged and decre
as follows: The order of the National Labor Rel
tions Board of May 31, 1960, is set aside.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

Approved:
/s/ PETER WOODBURY
Ch. J.

U.S. GOVERNMENT PRINTING OFFICE: 1961

FILED
NOV 20 1961
JOHN F DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 417

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

SYLVANIA ELECTRIC PRODUCTS, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Section 8(d)	4
Welfare and Pension Plans Disclosure Act (72 Stat. 997, effective January 1, 1959, 29 U.S.C. § 301 *et seq.*):	
Section 7	6, 7

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---

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

On September 18, 1961 the National Labor Relations Board (herein called the "Board") filed a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. On October 2, 1961 the time for filing a brief in opposition to the petition was extended to November 19, 1961.

Petitioner's statement of "the Board's Findings of Fact", although fairly complete, is inaccurate in certain respects. Contrary to the assertion that "The Company conceded during the negotiations that the cost of the insurance program was *material* in the determination of its bargaining position" (Pet. 4, italics supplied), the stipulated facts in the record, as adopted

by the trial examiner and Board, revealed no more than that "The Respondent has always *taken into consideration* the cost of those benefits in arriving at the level of benefits to be offered to the employees" (italics supplied) (JA 12, 14, 44). An erroneous impression is also conveyed by the statement (Pet. 4) that "its [the Company's] manager of industrial relations testified that much of the cost information sought by the Union could have been made available, but the Company nonetheless refused at all times to supply such information". This statement seems to imply that definite figures on the cost of insurance for the Seneca Falls plant were in Respondent's possession when the Union request was made. As the record discloses (JA 54-55) and the trial examiner found, however, the net cost to the Company of its insurance program is not known at the time the premiums are paid to the insurance carrier (JA 14, 54). Rather, the Company pays advance premiums on three different sets of policies, each of which covers employees on a multiplant basis including the Seneca Falls personnel (JA 14, 42, 54). Only at the end of the policy year are computations made to adjust the premiums in light of the claims incurred (JA 54).

Even the advance premium amounts are available only on a corporate basis (JA 51). To determine what portion of this estimated cost was allocable to Seneca Falls would involve actuarial computations as to the degree to which occupational hazards at that plant and the composition of its personnel (e.g., the ratio of the sexes, the average age of the workers) deviated from conditions typical in the other Sylvania plants covered by the respective policies (JA 51, 52). Thus the record permits no inference of bad faith with regard to the Company's refusal to grant the Union's request on

the ground (in addition to its legal reasons) that to do so would place "a severe burden on the personnel department". Nor did the Board *in its decision* make any such finding or implication (JA 2-37).

The summary (Pet. 5, 6) of the decisions of the Board and the court is also somewhat misleading. Nowhere in the Board's opinion is there reference to information "which must be available to both parties if there is to be meaningful collective bargaining", as the petition implies (Pet. 5). Instead, the Board found that under the Sylvania plan there inures to the employees "a benefit which constitutes an emolument of value . . . " (JA 34), which the Board deemed synonymous with or an integral part of "wages". Had it not been for Respondent's group insurance program, the Board surmised, the employees might have been required to allocate a portion of their wages for such purposes (JA 34). Hence the Board concluded (JA 35):

> "As the premiums paid by the Respondent constitute wages, it logically follows that the premium cost data requested by the Union relates directly to the matter of wages, and it appearing plain that this data was relevant to the Union's task as bargaining agent of Respondent's employees within the meaning of the cases, we conclude that the Respondent's refusal to furnish the requested data to the Union was violative of Section 8(a)(5) and (1) of the Act, as alleged in the complaint".

The court of appeals addressed itself to this proposition as well as to the "inarticulate premise" adverted to in the petition (Pet. 6). It reasoned (Pet. App. 22-23) that to define premium payments to a noncontributory insurance program as "wages" on the theory that otherwise the employees would pay for it "stretches our language in the *Cross* case about 'direct

and immediate economic benefits flowing from the employment relationship' too far, for it would expand the concept of wages so far as to break down if not destroy, the distinction drawn in the Act between 'wages, hours and other terms and conditions of employment,' as to which there is the mutual mandatory duty to bargain collectively, and those other matters as to 'which each party is free to bargain or not to bargain and to agree or not to agree.' *N.L.R.B.* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)."

THERE ARE NO VALID REASONS FOR GRANTING THE WRIT

The question presented by this record does not warrant review by this Court on any of the grounds ordinarily applicable to the granting of writs of certiorari (Rule 19, Sec. 1(b)) to United States Courts of Appeals. The text of the opinion of the court below reveals no conflict with the decision of the Seventh Circuit in *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641. In fact, the court below expressly stated that if the insurance plan drawn into issue had been partly paid for by employee contributions, as was the case with the *Swift* plan, its decision would have been otherwise.[1] Far from presenting any

[1] The court said: ". . . Moreover, we might take another step and agree with the trial examiner that the cost of plans to which employees contribute constitutes 'wages' by reason of the direct effect of each employee's contribution upon his pay check". . . . (Pet. App. B, p. 22). Moreover, in the *Swift* case the employer did not refuse to give the union the information or contend that the union was not entitled to it. The company simply failed to give the union information it sought on wages, job classifications, to which it was admittedly entitled, as well as on the costs of a health and welfare plan, and the Board and the court treated the failure to act on both requests as *in pari materia*. *N.L.R.B.* v. *Swift Co.*, 277 F. 2d 641 at 643-4, and at 645. Thus the issue here on which the trial examiner distinguished the *Swift* case (JA 28, 29) was not even raised in the Seventh Circuit.

important Federal question, the instant decision below turned upon the narrow, precise determination of whether an employer's premium payments to a *non*-contributory group insurance program are "wages" within the meaning of Section 8(d) of the Act.

The record reveals that the employer, pursuant to the union's request, did supply information relating not only to the schedule of benefits, but also the actuarial data, and the claims incurred in the operation of the plan. It afforded the union an opportunity to bargain about details of the schedule during the contract negotiations which were the subject of the Board's decision. Nevertheless, the Board now advances the contention that effective collective bargaining with respect to insurance plans wholly financed by employers would be jeopardized if the decision of the court of appeals is permitted to stand.

It is significant, however, that although Section 8(a)(5) of the National Labor Relations Act has been in effect and forcefully administered since 1935, it was not until 1958—23 years later—that the Board has taken so broad a position on a question of disclosure. It can fairly be inferred from the hiatus in testing the issue that the asserted detriment to the bargaining process has been exaggerated. In any event, by focusing upon the asserted usefulness to a union of the requested information in the formulation of bargaining proposals, Petitioner has injected a wholly theoretical issue into this proceeding. Such a criterion is not mentioned in the Act nor relied upon in any respect by the Board in the decision reviewed and set aside by the court below.

1. The Issue Presented by Petitioner Is Academic

Whatever importance as a matter of public policy the basic question of an employer's duty to disclose the costs of employee welfare plans possessed when this controversy arose in 1958, has vanished by reason of the passage of the Welfare and Pension Plans Disclosure Act (effective January 1, 1959, 72 Stat. 997, 29 U.S.C. § 301 ff). As Petitioner states (Pet. p. 8, n. 5), this Act compels companies to furnish to the Secretary of Labor as a matter of public record detailed information with respect to their premium *costs* as well as their level of benefits. In pertinent part, Section 7 of the Act, 29 U.S.C. § 306(d)(1), requires that the employee report:

> "The premium rate or subscription charge and the total premium or subscription charges paid to each carrier or organization and the approximate number of persons covered by each class of such benefits."

Although the petition suggests that the employer need not report the allocation of costs to the components of its plan in cases where it contracts with only one insurance carrier, this interpretation would appear to negate the requirement of Section 7 that the employer furnish both "the premium *rate* . . . and the *total premium* . . . charges paid to each carrier . . . and the number . . . covered by *each* class of such benefits." (Italics supplied). Since the three Sylvania policies, although negotiated with the same carrier, did not cover completely identical sets of employees (JA 42), it is difficult to understand the contention (Pet. 8, n. 5) that the Company filed a more complete breakdown of premium costs than the statute required.

In any event, it is plain that the Disclosure Act does impinge upon the precise considerations of policy which the Board has presented in this forum. If in fact Sylvania's reluctance to furnish the information was a hindrance to the union, and if this aspect of the matter is at all relevant to the question before this Court, the future impact of such conduct upon bargaining positions is of course dependent upon the scope of reporting requirements or reporting practices under the Disclosure Act. The Board's contentions concerning the impairment of future collective bargaining are speculative because they are premature.

Although Petitioner has chosen to view Sylvania's current reports on file as "not adequate for collective bargaining", it is at least an open question whether its notion is shared by the Steelworkers Union at Sylvania, or by unions generally. It is more reasonable to believe that whatever misgivings, if any, a union may have as to undue cost of a counter-proposal to an employer, would be allayed by knowledge of the overall cost of the employer's insurance program obtainable under the Disclosure Act.

2. On the Only Issue Presented to It, the Court Below Was Plainly Correct

The Board in this forum has attributed importance to the case on the theory that unless the requested information is divulged "the employees and their union representative cannot intelligently formulate proposals for negotiation . . ." (Pet. 8), and that "the essential point remains that intelligent discussion of alternative benefit proposals is frustrated . . ." (Pet. 9). Such an issue was never raised in the court below nor, as pointed

out in our "Statement", did the Board rest its decision on such grounds. In fact, in its brief to the court of appeals the Board expressly stated that such considerations were irrelevant to the disposition of the case, stating (Br. 17, n. 7):

> "In addition, it is settled that there is no requirement of a special showing that information pertaining to the wage structure of an employer is relevant to a particular bargaining purpose of the Union in order to establish the necessity of making such information available to the Union. *N.L.R.B.* v. *Woolworth*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9); *Boston Herald-Traveler Corp.* v. *N.L.R.B.*, 223 F. 2d 58, 62-64 (C.A. 1); *N.L.R.B.* v. *Whitin Machine Works*, 217 F. 2d 593, 594, certiorari denied, 349 U.S. 905; *N.L.R.B.* v. *The Item Co.*, 220 F. 2d 956 (C.A. 5) certiorari denied, 350 U.S. 836."

In dismissing the case after hearing, the trial examiner, in reviewing the authorities which had previously held that employers were under a duty in collective bargaining about health and welfare plans to furnish unions upon request the data as to costs, observed that all the cases brought to his attention dealt with plans financed in part by deductions from employee wages. He therefore concluded that since the cost of these plans directly affected an employee's take-home pay, a refusal to state the cost was tantamount to refusal to disclose information on existing pay scales or wage incentive plans.

The rationale of such decisions was that the information was necessary to enable a union to bargain on wages and because the statute requires collective bargaining on "wages, hours, and other conditions of employment", an employer who withholds such informa-

tion is removing a mandatory subject of discussion from the bargaining table. The trial examiner held that the rationale of those cases was not applicable to bargaining within the framework of a plan wholly financed by an employer as long as the employer was willing to provide data on the schedule of benefits and to bargain about changes in the schedule. He pinpointed the distinction as follows (JA 27):

> "Thus in each of these cases, unlike the instant one, we have an insurance program where not only is it the benefits that are of bargainable significance to the employees, but so are the premiums for as an expense to the employees they are deductible, presumably, from their wages. Thereby they are directly related to those wages. In a word, no one is, or could, argue that the portion of an employee's paycheck allocated to pay his insurance premium is an item of information to which neither he, nor his bargaining representative, would be entitled."

The Board refused to recognize any such distinction, holding that the costs even of a non-contributory plan were the equivalent of wages and consequently there was a mandatory duty to provide information with respect to such costs and presumably to bargain about them. The court of appeals, however, drew the same distinction as had the trial examiner (Pet. 22):

> "Moreover, we might take another step and agree with the trial examiner that the cost of plans to which employees contribute constitutes 'wages' by reason of the direct effect of each employee's contribution upon his pay check. It is quite another matter, however, to go further and endorse the Board's broad conclusion that the cost of a group employee insurance program defrayed entirely by the employer also constitutes 'wages' to employees. In the absence of any controlling authority or

> indeed, of any judicial authority cited or discovered by our own efforts, we decline to take that step."

In view of the well-accepted principle that refusal to furnish information pertaining to "wages" is *ipso facto* an illegal refusal to bargain, the trial examiner, Board, and court of appeals properly directed their attention to whether in fact employer payments to a noncontributory insurance program were "wages" within the meaning of the Act. The nature of that judgment did not turn on any consideration of the utility of such information to the union—the issue raised for the first time in the Board's petition—but upon its relation to "wages". Indeed, such a standard had expressly been repudiated by the Board in *Pine Industrial Labor Relations Committee*, 118 NLRB 1055, 1061,[2] where it stated:

> "In deciding this case we have not been unaware of the consideration that possession at the outset of bargaining of the facts about the employer's economic position may be helpful to the union in tailoring its wage demands to what the employer can reasonably pay and therefore make bargaining, perhaps, more realistic and successful. But our duty under the Act is here to determine whether the obligation of good faith bargaining has been met rather than to establish ideal bargaining conditions."

Here the Board is intimating that Respondent has violated the good faith bargaining requirements of the Act by removing a bargainable matter from the negotiating table. Indeed, this was another "inarticulate

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[2] Aff'd sub nom., *International Woodworkers* v. *N.L.R.B.*, 263 F. 2d 483 (CADC).

premise" of the Board's decision, for the cases which it relied upon in support of its holding, *Richfield Oil Corporation*,[3] and *Inland Steel Company*,[4] were cases turning upon the employers' steadfast refusal to discuss, respectively, a stock purchase plan for employees and a pension and retirement plan. This is, moreover, the thrust of a portion of the article by the present Solicitor General, cited in the petition (p. 11), who observed, 71 Harv. L. Rev. 1401, 1428:

> "In some of the cases the employer avowedly challenged the bargainability of the subject upon which information was withheld. In others he was obviously seeking to avoid negotiations upon the issue. In virtually all the cases, except those involving financial data, there could be no negotiation on the subject, in any sense of the term, until the information was supplied to the union." [Footnotes omitted.]

In view of Respondent's bargaining history with the union, particularly with respect to the negotiation of group insurance plans, the Board's theory strains the imagination. The record clearly establishes that respondent had negotiated such plans with the union in previous years, and once again reached agreement on a plan in the negotiations which gave rise to the instant unfair labor practice charge (JA 13, 14). Respondent always was willing to, and did, discuss the benefits under such plans and furnish whatever information was requested with regard to such benefits. Inasmuch as it never interposed the cost of premiums as the predicate to whatever counter offers it made to union

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[3] 110 NLRB 356, enf'd 231 F. 2d 717 (CADC).

[4] 77 NLRB 1, enf'd 170 F. 2d 247 (CA 7), cert. denied 336 U.S. 960.

proposals, the expense of such insurance was never drawn into issue. Under these circumstances, the Board's conjecture concerning the impairment of collective bargaining finds no support in the record.[5]

In reaching the sound conclusion that the cost of the insurance program did not constitute "wages",[6] the court could also have held that such "costs" are not "terms and conditions of employment"—another subject on which employers and unions are required to bargain under Section 8(d) of the Act. Had Respondent shifted its insurance plan to another carrier charging lower premiums—as the Union intimated it might ask the Company to do[7]—it is perfectly clear that unless the level of benefits were revised, the "terms and conditions of employment" would not have been altered in the slightest.

The Board's holding that the authorities relating to contributory plans are equally controlling in cases where the employee makes no contribution betrays a confusion between a bargaining relationship and a

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[5] As the trial examiner found (JA 30):

> "Actually the question of achieving better coverage at the same cost is academic to this case. For the employer, in bargaining with respect to insurance benefits, never claimed his inability to pay the cost of *any* benefit proposal presented (*supra*, p. 5). As the element of cost was, therefore, never injected into the bargaining demands, the Respondent's ability to pay them, or to pay greater costs for larger benefits, is not in issue and information with respect to his costs and his ability to pay them is not a necessity to bargaining." [Original emphasis.]

[6] See *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29.

[7] See "Stipulation" (JA 41 at 43).

fiduciary one. Fiduciary status, with its attendant obligations of disclosure and accounting, is not properly a part of the arm's length relationship which the very term "bargain" indicates should exist between an employer and a union under the Act.

Accordingly, the law applicable to fiduciaries cannot be invoked in a case such as the instant one, where no trust arrangement is present. In a case such as *Swift*, however, the collective agreement establishes a limited trust, for the employer, by collecting the employees' share of the premium for transmittal to the insurance carrier and receiving possible dividends, owes his employees a duty of accounting. Since the employer is accountable to his employees for the receipts, *a fortiori*, he must disclose the amounts collected and transmitted.

Decisions saying that employee bargaining representatives are entitled to certain information do not mean that the courts view unions and employers as partners with certain fiduciary obligations springing from the bargaining relationship. Thus the cases holding that the certified representative has the right to know the wages of each individual in the bargaining unit, e.g., *Boston Herald-Traveler* v. *N.L.R.B.*, 223 F. 2d 58 (CA 1); *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, are not really disclosure cases at all, for each employee in the bargaining unit already knows what his rate of pay is. But since the law makes the majority representative the exclusive representative of all the employees in the unit, irrespective of their wishes, it follows that such representative is entitled to the sum of all the wage information in the possession of each individual employee in order to bargain for the group

on this subject.[8] It is plain that divulgence cannot be compelled here under this standard, for no employee has knowledge of the premium cost of his insurance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] Similarly where the negotiated wage rates are based upon a piecework system or job evaluation plan, the bargaining representative is entitled to know the methods of calculation so as to be able to ascertain whether the contract wage rates have been complied with. *Taylor Forge & Pipe Works* v. *N.L.R.B.*, 234 F. 2d 227 (CA 7), cert. den'd 352 U.S. 942.